

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 177

Docket No. DC-0731-09-0261-I-1

**Hyginus U. Aguzie,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

September 3, 2009

John E. Carpenter, Esquire, Washington, D.C., for the appellant.

Darlene M. Carr, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the Office of Personnel Management (OPM)'s suitability action.¹ We find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. For the reasons set forth below, however, we

¹ The administrative judge characterized the case as an appeal of a suitability determination. However, OPM's regulation at [5 C.F.R. § 731.501\(a\)](#), as revised effective June 16, 2008, states that it is the suitability action which may be appealed to the Board. *Contra Folio v. Department of Homeland Security*, [402 F.3d 1350](#), 1353 (Fed. Cir. 2005) (Board's review of a suitability decision does not include the ultimate action taken by the agency).

REOPEN this case on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND for further proceedings.

BACKGROUND

¶2 On May 17, 2006, the U.S. Commission on Civil Rights (USCCR) hired the appellant as a GS-9 Budget Analyst, on a career conditional appointment subject to a 1-year probationary period. Initial Appeal File (IAF), Tab 4(2qq). By letter dated December 15, 2008, OPM informed the appellant that it had found him unsuitable for his position and had taken the following actions: (1) directed USCCR to remove him from the rolls within 5 days of its receipt of the decision, pursuant to [5 C.F.R. § 731.304](#); (2) cancelled any reinstatement eligibility obtained from his appointment or any other eligibilities he may have had for positions covered under 5 C.F.R. part 731; and (3) debarred him from competition for, or appointment to, any covered position for a period of 3 years ending December 11, 2011. IAF, Tab 4(2b). The record does not include an SF-50 recording the appellant's removal, but neither party disputes that USCCR complied with OPM's instruction.

¶3 The appellant filed an appeal with the Board, contesting OPM's suitability action and raising affirmative defenses of harmful error and discrimination based on race and national origin. IAF, Tab 1. The administrative judge found that the Board had jurisdiction over the appeal under [5 U.S.C. § 7701](#) and [5 C.F.R. § 731.501](#). IAF, Tab 9. Following a hearing, the administrative judge sustained the charge, found the appellant's affirmative defenses unproven, and affirmed the suitability decision. IAF, Tab 13.

ANALYSIS

¶4 We reopen this case to address the question, not raised below or on petition for review, of whether the appellant is entitled to appeal his removal to the Board as an adverse action under 5 U.S.C. chapter 75, subchapter II. At the time of his removal, the appellant occupied a competitive service position and had completed

his 1-year probationary period. *See* IAF, Tab 4(2qq). He therefore satisfies the definition of an “employee” at [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#). Furthermore, with certain exceptions not applicable here, a removal falls within the scope of 5 U.S.C. chapter 75, subchapter II. *See* [5 U.S.C. § 7512](#). Under regulations prescribed by OPM, an agency may take an action covered by that subchapter against an employee only for such cause as will promote the efficiency of the service. [5 U.S.C. § 7513\(a\)](#). An employee against whom such an action is taken is entitled to certain procedural protections, listed at § 7513(b), and is also entitled to appeal the action to the Board. [5 U.S.C. § 7513\(d\)](#). Consequently, it appears the appellant in this case may have a statutory right to appeal his removal as an adverse action under chapter 75, subchapter II, notwithstanding OPM’s characterization of the removal as an action under 5 C.F.R. part 731.²

¶5 The distinction is not merely academic. Our jurisdiction over adverse actions under 5 U.S.C. chapter 75, subchapter II includes the authority to mitigate penalties. *See Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 296 (1981). In addition, the respondent in an adverse action appeal would not be OPM, but rather USCCR, as it was the latter agency that effected the removal action, even

² In the Federal Register notice announcing the June 16, 2008 revision of its suitability regulations, OPM contended that where there is a choice between taking an action under 5 C.F.R. part 731 or another authority, the Board “cannot hold an agency to standards relating to a legal authority the agency did not invoke.” 73 Fed. Reg. 20149, 20153 (Apr. 15, 2008). For the Board to do so, OPM argued, would be contrary to *Lovshin v. Department of the Navy*, [767 F.2d 826](#) (Fed. Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1111 (1986), in which our reviewing court held that an agency may rely on either 5 U.S.C. chapter 43 or chapter 75 to take a performance-based action. *Id.* at 843. *Lovshin* differs from this case, however, in that chapter 43 and chapter 75 procedures are, by statute, mutually exclusive, at least with respect to specific charges. *See* [5 U.S.C. § 7512\(D\)](#); *Lovshin*, 767 F.2d at 843 (agency may bring a mixed case, relying on chapter 43 for charge of unacceptable performance but also chapter 75 for alternative or additional charges). Thus, an agency may prevent the Board from applying chapter 75 standards by invoking chapter 43 as the sole authority for its performance-based action. By contrast, we are aware of no statutory provision that would preclude a removal action ostensibly taken under 5 C.F.R. part 731 from being adjudicated under chapter 75 standards.

if it did so at OPM's direction. See [5 C.F.R. § 731.304](#) ("the employing agency must remove the appointee or employee from the rolls within 5 work days of receipt of OPM's final decision.").

¶6 We note that under OPM's current regulations governing suitability determinations and actions, a removal action may not be taken under both 5 C.F.R. part 731 and part 752. See [5 C.F.R. § 731.204\(f\)](#) ("[a]n action to remove an appointee or employee . . . under this part is not an action under part . . . 752 of this chapter."). An action under 5 U.S.C. chapter 75, subchapter II, is ipso facto an action under 5 C.F.R. part 752, which incorporates that subchapter in its entirety. See [5 C.F.R. § 752.301](#). Thus, if the appellant's removal was an action under 5 U.S.C. chapter 75, subchapter II, OPM's own regulations preclude it from being construed as a suitability action under 5 C.F.R. part 731, even though USCCR acted in compliance with an OPM directive issued under the purported authority of [5 C.F.R. § 731.304](#). Cf. *Cruz-Packer v. Department of Homeland Security*, [102 M.S.P.R. 64](#), ¶ 6 (2006) ([5 C.F.R. § 731.105\(b\)](#) did not serve as authority for removal of excepted service employee, notwithstanding agency's characterization of the action as a "suitability determination."). To the extent § 731.204(f) may purport to carve out an exception to the Board's statutory jurisdiction under [5 U.S.C. § 7513\(d\)](#), the validity of the regulation is in doubt. Cf. *DoPadre v. Office of Personnel Management*, [69 M.S.P.R. 346](#), 351-52 (1996) (invalidating regulation intended to limit Board's authority under [5 U.S.C. § 8347\(d\)\(1\)](#) to review OPM's application of regulations governing court orders affecting retirement benefits); *Cuellar v. U.S. Postal Service*, [8 M.S.P.R. 624](#), 632 (1981) (invalidating regulation allowing for emergency suspensions in situations not within the "crime exception" of 5 U.S.C. § 7513(b)).

ORDER

¶7 The initial decision is vacated. On remand, the parties shall be provided an opportunity to brief the question of whether the appellant is entitled to appeal his

removal under [5 U.S.C. § 7513](#)(d), and, if so, whether the other actions on appeal, i.e., debarment and cancellation of eligibilities, remain within the Board's jurisdiction under [5 C.F.R. § 731.501](#). Should the administrative judge find that the appellant has appeal rights under [5 U.S.C. § 7513](#)(d), the appellant shall be granted 30 days from the date of the remand decision in which to file a timely appeal of his removal, with USCCR as the respondent agency. Should the administrative judge find that one or more of the suitability actions on appeal is within the Board's jurisdiction under [5 C.F.R. § 731.501](#), the parties shall also be provided an opportunity to brief the question of how and whether the June 16, 2008 revision of OPM's suitability regulations may affect the scope of the Board's review of those actions.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.